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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

GREG REYNOLDS, et al., Plaintiffs and Respondents, v. CONNOR H. POPE, Defendant and Appellant.	A155406 (San Mateo County Super. Ct. No. CIV536328)

Connor H. Pope (Defendant) invited friends to his house for the express purpose of taking LSD. His neighbors, Greg and Megan Reynolds[1] (collectively, Plaintiffs), were injured as a result of one of his guests' drug use. In this appeal from a judgment in favor of Plaintiffs on their negligence claim, we reverse an award of penalties for Defendant's refusal to accept a pretrial settlement offer and otherwise affirm.

FACTUAL BACKGROUND

In January 2015, Defendant, then 18 years old, and a few friends decided to take LSD. Defendant offered his parents' home, where he then

[1] Megan Reynolds was known as Megan Pirovano at the time the case was filed in the superior court. For convenience, we refer to Greg and Megan individually by their first names. No disrespect is intended.

lived, as the location. Around 11 a.m. on the designated day, the friends gathered at Defendant's house. One brought LSD and they all took some. After ingesting the LSD, Dominic Pintarelli became agitated and violent. Pintarelli attacked Defendant, destroyed property in Defendant's house, and then left.

Around 3 p.m., Greg heard a loud commotion outside his home and saw Pintarelli attempting to knock over a mailbox. When Greg went outside, Pintarelli was sitting on the ground taking off his clothes. Greg asked if he needed help. Pintarelli started attacking Greg and Greg returned inside his house and locked the door. Pintarelli ran at Plaintiffs' front door, cracking the frame in an apparent attempt to knock it down. Greg, worried that Pintarelli would succeed in knocking down the door, opened the door and punched Pintarelli. Police arrived on the scene shortly thereafter.

At the time of the incident, Greg had been a professional baseball pitcher since 2006 and was preparing for the 2015 spring training. Plaintiffs submitted evidence that Greg injured his hand when he hit Pintarelli, impairing his ability to pitch and substantially impacting his future income. Plaintiffs also submitted evidence about the emotional impact on both Greg and Megan.

A defense expert in drug recognition testified that the drug taken by Pintarelli was likely not LSD but instead PCP or a similar drug. PCP often causes users to become violent without provocation. The expert also testified that when people take illegal drugs, they do not know the quantity or type of drug they are taking and are therefore "rolling the dice with what [they are] consuming."

PROCEDURAL BACKGROUND

Plaintiffs sued multiple parties on multiple causes of action. A jury trial was held on Plaintiffs' negligence claim against Defendant and Pintarelli, as well as a battery claim against Pintarelli.

On the negligence claim, the jury found Defendant, Pintarelli, and Greg all negligent, with Defendant 40 percent at fault, Pintarelli 55 percent at fault, and Greg 5 percent at fault. The jury found Plaintiffs' economic damages to be more than $1.5 million, plus additional noneconomic damages.

Following judgment, Defendant filed a motion for judgment notwithstanding the verdict and other postjudgment motions, which were all denied.

DISCUSSION

I. *Duty of Care*

Defendant argues he did not owe Plaintiffs a duty of care as a matter of law. We disagree.[2]

A. *Legal Standards*

"A plaintiff in a negligence suit must demonstrate ' "a legal duty to use due care, a breach of such legal duty, and the breach as the proximate or legal cause of the resulting injury." ' . . . . The existence of a duty is a question of law, which we review de novo." (*Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, 1083 (*Vasilenko*).)

"Civil Code section 1714, subdivision (a) 'establishes the general duty of each person to exercise, in his or her activities, reasonable care for the safety of others.' . . . . '[I]n the absence of a statutory provision establishing an

[2] We reject Plaintiffs' contention that Defendant forfeited the argument by failing to raise it below. Defendant sufficiently argued the issue in his motion for judgment notwithstanding the verdict.

exception to the general rule of Civil Code section 1714, courts should create one only where "clearly supported by public policy." ' [Citation.] [¶] In determining whether policy considerations weigh in favor of such an exception, we have looked to" a number of factors relating to foreseeability and public policy, commonly referred to as the *Rowland*[3] factors. (*Vasilenko, supra,* 3 Cal.5th at pp. 1083, 1085.) "We do not ask whether these factors (the *Rowland* factors) 'support an exception to the general duty of reasonable care on the facts of the particular case before us, but whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy.' " (*Id.* at p. 1083.)

B. Rowland *Factors*

The issue before us is whether a categorical exception to the general duty of care should be made exempting social hosts who knowingly invite others for the sole purpose of using illegal drugs from liability to third parties for harm caused by an invitee's drug use. (See *Vasilenko, supra,* 3 Cal.5th at p. 1084 [" 'the [legal duty] issue is . . . properly stated as whether a categorical exception to [the general duty of care] should be made' exempting those who own, possess, or control premises abutting a public street from liability to invitees for placing a parking lot in a location that requires invitees to cross the public street"]; *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 774 (*Cabral*) ["the [legal duty] issue is also properly stated as whether a categorical exception to [the general duty of care] should be made exempting drivers from potential liability to other freeway users for stopping alongside a freeway"].)

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[3] *Rowland v. Christian* (1968) 69 Cal.2d 108.

1. *Foreseeability Factors*

" 'Three [*Rowland*] factors—foreseeability, certainty, and the connection between the plaintiff and the defendant—address the foreseeability of the relevan[t] injury . . . .' " (*Vasilenko, supra,* 3 Cal.5th at p. 1085.)

a. *Foreseeability*

Defendant primarily argues Pintarelli's violent conduct was not foreseeable. He points to the lack of evidence "of any propensity by Pintarelli toward violent conduct or that Pintarelli committed any past violent behavior after ingesting drugs or that [Defendant] knew of any such violent behavior." This fact-specific argument is unavailing. When considering foreseeability for purposes of the legal duty analysis, a court's task " 'is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed . . . .' " (*Cabral, supra,* 51 Cal.4th at p. 772.)

Thus, the question is whether it is reasonably foreseeable that knowingly inviting guests to one's residence for the sole purpose of using illegal drugs may result in harm to third parties from an invitee's drug use. A case relied on by Defendant, *Sakiyama v. AMF Bowling Centers, Inc.* (2003) 110 Cal.App.4th 398 (*Sakiyama*), indicates such harm is foreseeable.[4] In that case, the defendant leased its facility for an all-night "rave" party and "took numerous steps to confiscate and remove both drugs and drug paraphernalia from the facility." (*Id.* at pp. 402–403.) Nonetheless, a group of four

[4] *Sakiyama* ultimately determined the defendant owed no duty to the plaintiffs under the *Rowland* factors. See the discussion in Part I.B.2.a., *post.*

teenagers bought and took ecstasy at the rave; when one of them drove the others home some hours later, their car crashed, killing two and severely injuring the other two. (*Ibid.*) The Court of Appeal found the injury foreseeable for purposes of the duty analysis, noting " 'the low threshold' " for foreseeability and reasoning: "It was foreseeable that attendees would attempt to sneak drugs into the facility. It was foreseeable that attendees might purchase and use drugs. It was foreseeable that the partygoers would attempt to drive home, either while impaired from drug use and/or from fatigue, if they stayed at the party all night long." (*Id.* at p. 407.) Here, where the sole purpose of the gathering was to use illegal drugs, it was foreseeable—indeed, nearly certain—that drugs would be used. It was also foreseeable that a third party might be harmed by an invitee's drug use. Defendant emphasizes the lack of evidence that LSD causes violent behavior, but as his own expert testified, it is foreseeable that an illegal drug may not be the one the user intended to take.

Defendant argues there must be evidence of prior similar incidents, citing *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666 (*Ann M.*), disapproved of on another ground by *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, fn. 5. In *Ann M.,* the issue was "whether the scope of the duty owed by the owner of a shopping center to maintain common areas within its possession and control in a reasonably safe condition includes providing security guards in those areas." (*Id.* at p. 670.) The Supreme Court based its holding on considerations specific to the hiring of security guards, including that "[t]he monetary costs of security guards is not insignificant" and "the social costs of imposing a duty on landowners to hire private police forces are also not insignificant." (*Id.* at p. 679.) Because of these considerations, the Supreme Court held "a high degree of foreseeability is required in order to

find that the scope of a landlord's duty of care includes the hiring of security guards" and "the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises." (*Id.* at p. 679, fn. omitted.) Defendant cites no authority that this heightened foreseeability requirement applies to hosts of parties held for the sole purpose of taking illegal drugs. (See *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 539 (*Melton*) ["The California Supreme Court has repeatedly found 'the burden of *hiring security guards*' to be 'extremely high, so high in fact, that the requisite foreseeability to trigger the burden could rarely, if ever, be proven without prior similar incidents.' " (italics added)].)

b. *Connection*

Another *Rowland* factor, " 'the closeness of the connection between the defendant's conduct and the injury suffered' [citation], is 'strongly related to the question of foreseeability itself' [citation], but it also accounts for third-party or other intervening conduct. [Citation.] Where the third party's intervening conduct is foreseeable or derivative of the defendant's, then that conduct does not ' "diminish the closeness of the connection between defendant['s] conduct and plaintiff's injury." ' " (*Vasilenko, supra,* 3 Cal.5th at p. 1086.) In *Vasilenko,* the plaintiff "was struck by a car as he crossed a public street between the main premises of [the defendant church] and the Church's overflow parking area." (*Id.* at p. 1081.) The Supreme Court found "[t]here is a foreseeable risk of collision whether or not the invitee or the driver is negligent. But unless the landowner impaired the driver's ability to see and react to crossing pedestrians, the driver's conduct is independent of the landowner's. Similarly, unless the landowner impaired the invitee's ability to see and react to passing motorists, the invitee's decision as to when,

where, and how to cross is also independent of the landowner's. Because the landowner's conduct bears only an attenuated relationship to the invitee's injury, we conclude that the closeness factor tips against finding a duty." (*Id.* at p. 1086.)

Although it is foreseeable that an invitee's illegal drug use will harm a third party, we find the relationship between a host's invitation and an invitee's harmful conduct somewhat attenuated. The host enables the invitee's drug use by providing a location for it to take place but, absent additional conduct, does not control an invitee's reaction to the drug or facilitate any harmful conduct that ensues.[5]

2. *Policy Factors*

The remaining *Rowland* factors—" 'moral blame, preventing future harm, burden, and availability of insurance—take into account public policy concerns that might support excluding certain kinds of plaintiffs or injuries from relief.' " (*Vasilenko, supra,* 3 Cal.5th at p. 1085.) " 'A duty of care will not be held to exist even as to foreseeable injuries . . . where the social utility of the activity concerned is so great, and avoidance of the injuries so burdensome to society, as to outweigh the compensatory and cost-internalization values of negligence liability.' " (*Id.* at pp. 1086–1087.)

a. *Moral Blame*

The sole policy factor specifically argued by Defendant is moral blame. "We have previously assigned moral blame, and we have relied in part on that blame in finding a duty, in instances where the plaintiffs are

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[5] Defendant does not argue the remaining foreseeability factor, certainty, weighs against a duty of care. We agree with the implied concession. With respect to the degree of certainty that the plaintiff suffered an injury, "this is not a case where the 'only claimed injury is an intangible harm.' " (*Vasilenko, supra,* 3 Cal.5th at p. 1085.)

particularly powerless . . . compared to the defendants or where the defendants exercised greater control over the risks at issue." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1151.) Social hosts who knowingly invite others for the sole purpose of using illegal drugs hold greater power and exercise greater control over the risks as compared to third-party bystanders. We are not persuaded by Defendant's argument that hosting a party is not blameworthy. Notably, in *Sakiyama*, the Court of Appeal found the defendant not morally blameworthy for hosting a rave because, in part, the defendant "took numerous steps to prevent drug use at its facility, including searching the attendees, confiscating drugs and drug paraphernalia, and evicting any drug dealers." (*Sakiyama, supra,* 110 Cal.App.4th at p. 410.) Hosting a party for the sole purpose of using illegal drugs stands in sharp contrast to this behavior.

b. *Social Host Liability for Alcohol Consumption*

Defendant also argues the public policy against holding social hosts liable for their invitees' alcohol consumption weighs against a finding of duty here. He points to the statutory exception to the general duty of care for social hosts who furnish "alcoholic beverages" (Civ. Code, § 1714, subd. (c)), and argues "[a] similar analysis should apply to the furnishing of drugs." Defendant provides no authority for the apparent contention that we should expand this statutory exception well beyond its plain language. We decline to do so. (*In re Marriage of Vargas & Ross* (2017) 17 Cal.App.5th 1235, 1241 [" ' " ' "When interpreting statutory language, we may neither insert language which has been omitted nor ignore language which has been

inserted." ' " ' "].)[6] Defendant's reliance on out of state cases discussing social host liability for serving alcohol is similarly unavailing.

3. *Conclusion*

Defendant has identified only one of the seven *Rowland* factors that we agree weighs in favor of finding no duty. Accordingly, he has failed to establish that an exception to the general duty of care for social hosts who knowingly invite others for the sole purpose of using illegal drugs is " ' "clearly supported by public policy." ' " (*Vasilenko, supra,* 3 Cal.5th at pp. 1083, 1085.)

C. *Duty to Protect*

Defendant additionally argues this is a case of nonfeasance, not misfeasance, and he had no special relationship with Plaintiffs giving rise to a duty to protect.

"When analyzing duty in the context of third party acts, courts distinguish between 'misfeasance' and 'nonfeasance.' [Citation.] 'Misfeasance exists when the defendant is responsible for making the plaintiff's position worse, i.e., defendant has created a risk.' " (*Melton, supra,* 183 Cal.App.4th at p. 531.) In such cases, " 'the question of duty is governed by the standards of ordinary care.' " (*Ibid.*) " '[N]onfeasance is found when the defendant has failed to aid plaintiff through beneficial intervention.' "

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[6] To the extent Defendant argues that, as a matter of common law, we should reach the same result as Civil Code section 1714, subdivision (c), he provides no authority that our common law inquiry is guided by anything other than the *Rowland* factors. (See *Vasilenko, supra,* 3 Cal.5th at p. 1083 [" '[I]n the absence of a statutory provision establishing an exception to the general rule of Civil Code section 1714, courts should create one only where "clearly supported by public policy." [Citation.] [¶] In determining whether policy considerations weigh in favor of such an exception, we have looked to . . . the *Rowland* factors."].)

(*Ibid.*) "[N]onfeasance generally does not give rise to a legal duty," although " '[a] defendant may owe an affirmative duty to protect another from the conduct of third parties if he or she has a "special relationship" with the other person.' " (*Id.* at pp. 531–532.)

We disagree with Defendant's assertion that this is a nonfeasance case. As discussed above, hosting a party for the sole purpose of using illegal drugs created a foreseeable risk of harm to third parties from one of his invitees' drug use. (Cf. *Melton, supra,* 183 Cal.App.4th at pp. 527, 533 [the defendant's open invitation on a social networking site to a party with music and alcohol did not "increase[] the risk of harm to plaintiffs," who were attacked by other party attendees].) Accordingly, the lack of a special relationship between Defendant and Plaintiffs does not impact the duty owed by Defendant.

II. *Superseding Cause Instruction*

The trial court instructed the jury with CACI No. 432 on superseding cause. The trial court also issued a special instruction with language derived in part from the following discussion of superseding cause in *Lawson v. Safeway Inc.* (2010) 191 Cal.App.4th 400, 417: " 'Third party negligence which is the immediate cause of an injury may be viewed as a superseding cause when it is so highly extraordinary as to be unforeseeable. [Citations.] "The foreseeability required is of the risk of harm, not of the particular intervening act. In other words, the defendant may be liable if his conduct was 'a substantial factor' in bringing about the harm, though he neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred." [Citation.] It must appear that the intervening act has produced "harm of a kind and degree so far beyond the risk the original

tortfeasor should have foreseen that the law deems it unfair to hold him responsible." ' "

Defendant contends the special instruction was erroneous and asserts, without analysis, that the error was "inherently prejudicial." We need not and do not address whether the instruction was proper, because Defendant has not shown any error was prejudicial. "[T]here is no rule of automatic reversal or 'inherent' prejudice applicable to any category of civil instructional error, whether of commission or omission." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.) Instead, "[i]nstructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict,' " in light of factors such as "(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Id.* at pp. 580–581.) Defendant's briefs attempt no such analysis, other than setting forth evidence favorable to Defendant and asserting it rendered Plaintiffs' injuries unforeseeable. "[W]e cannot presume prejudice and will not reverse the judgment in the absence of an affirmative showing there was a miscarriage of justice. (Cal. Const., art. VI, § 13; [citations].) Nor will this court act as counsel for appellant by furnishing a legal argument as to how the trial court's ruling was prejudicial. [Citations.]' [Citation.] Because there is no showing of prejudicial error, we affirm the trial court's ruling." (*Property Reserve, Inc. v. Superior Court* (2016) 6 Cal.App.5th 1007, 1020.)

III. *Limiting Instructions*

In the standard of review section of Defendant's opening brief, he contends the trial court abused its discretion in issuing and repeating limiting instructions; however, he fails to raise the argument in the discussion section until his reply brief. The contention is arguably forfeited

as insufficiently raised in Defendant's opening brief. (Cal. Rules of Court, rule 8.204(a)(1)(B) [appellate briefs must "[s]tate each point under a separate heading or subheading summarizing the point"]; *Tellez v. Rich Voss Trucking, Inc.* (2015) 240 Cal.App.4th 1052, 1066 (*Tellez*) [" ' " '[T]he rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.' " ' "].)

In addition, Defendant fails to assert—much less provide supporting record citations—that he objected below to the trial court's limiting instructions. "As a general rule, a claim of error will be deemed to have been forfeited when a party fails to bring the error to the trial court's attention by timely motion or objection." (*Avalos v. Perez* (2011) 196 Cal.App.4th 773, 776.)

In any event, Defendant's assertion that the limiting instructions improperly highlighted the excluded evidence is unavailing. "As a general rule, juries are presumed to follow a trial court's limiting instructions." (*Phillips v. Honeywell Internat. Inc.* (2017) 9 Cal.App.5th 1061, 1081.) To the extent Defendant attempts to argue the underlying evidentiary rulings were erroneous, he provides no authority or analysis to support the claim. "When an appellant asserts a point but fails to support it with reasoned argument and citations to authority, we treat the point as forfeited." (*Tellez, supra,* 240 Cal.App.4th at p. 1066.)

IV. *Economic Damages*

Defendant argues the $1.5 million economic damages award "is excessive and so far against the weight of the evidence that it is the obvious result of the passion and prejudice flowing from the evidence of drug use by Pintarelli and [Defendant]."

"In assessing a claim that the jury's award of damages is excessive, we do not reassess the credibility of witnesses or reweigh the evidence. To the contrary, we consider the evidence in the light most favorable to the judgment, accepting every reasonable inference and resolving all conflicts in its favor." (*Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078 (*Westphal*).) "We must uphold an award of damages whenever possible [citation] and 'can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.' " (*Ibid.*)

Defendant points to evidence that Greg's economic damages were lower than the jury's award. On substantial evidence review, "we do not . . . reweigh the evidence." (*Westphal, supra,* 68 Cal.App.4th at p. 1078.) Similarly, we do not review the jury's credibility findings as to Plaintiffs' expert witnesses. (*Bloxham v. Saldinger* (2014) 228 Cal.App.4th 729, 750 [" ' " 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' " [Citation.]' [Citation.] These appellate rules of review apply to the testimony of expert witnesses as well as that of lay witnesses."].)

There was evidence from which the jury could find Greg would have made well over $1.5 million had he not injured his hand when he punched Pintarelli, including evidence that, in 2006, Greg was the second overall pick in the Major League Baseball draft; in 2014, Greg was paid more than $800,000 to play in Japan, a league one expert characterized as "the second-best league in the world"; in January 2015, according to expert testimony,

Greg was at the "Major League starting pitcher" level and would have likely played for five more seasons; a preexisting hamstring injury would not have impaired his pitching career; and Greg's potential future income was estimated by one expert to be between $1.5 and $13 million and by a second expert to be between $1.2 and $12.3 million. This evidence is sufficient to support the award. This case is a far cry from *Cunningham v. Simpson* (1969) 1 Cal.3d 301, relied on by Defendant, in which the jury awarded $25,000 in damages but "the only actual damage related to" the defendant's conduct was $300. (*Id.* at pp. 308–309.)

V. *Section 998 Penalties*

Defendant challenges the trial court's award of expert witness fees and prejudgment interest. We agree with this challenge.

A. *Additional Background*

Plaintiffs' complaint named Defendant's parents, Elsa and Randy Egger, as defendants. Plaintiffs each submitted a single Code of Civil Procedure section 998[7] offer to Defendant and the Eggers, offering to settle jointly with the three defendants. Greg Reynolds offered to settle with Defendant and the Eggers for a payment of $900,000; Megan Reynolds offered to settle for a payment of $100,000. Neither offer was accepted. Before trial, Plaintiffs dismissed their claims against both of the Eggers in exchange for a waiver of costs.

The final judgment included, over Defendant's objection, Plaintiffs' expert costs and prejudgment interest as section 998 penalties.

[7] All further statutory references are to the Code of Civil Procedure, unless otherwise stated.

B. *Legal Principles*

"[S]ection 998 is a cost-shifting statute designed to encourage parties to settle their lawsuits prior to trial by punishing a party that refuses a reasonable settlement offer." (*Gonzalez v. Lew* (2018) 20 Cal.App.5th 155, 158, fn. omitted (*Gonzalez*).) Specifically, "[i]f a defendant fails to accept a plaintiff's section 998 offer and also fails to obtain a judgment that is more favorable than the plaintiff's offer, the plaintiff may seek prejudgment interest" and " 'costs of the services of expert witnesses . . . .' " (*Burch v. Children's Hospital of Orange County Thrift Stores, Inc.* (2003) 109 Cal.App.4th 537, 543–544 (*Burch*).) Thus, " 'section 998 provides "a strong financial disincentive to a party—whether it be a plaintiff or a defendant—who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer." ' " (*Gonzalez,* at p. 161.)

"In order to trigger section 998, a settlement offer must be clear, in that it must allow the party receiving the offer to evaluate whether the party making the offer is likely to obtain a more favorable verdict at trial." (*Gonzalez, supra,* 20 Cal.App.5th at p. 158.) Accordingly, " 'a plaintiff who makes a [section] 998 offer to joint defendants having *potentially varying liability* must specify the amount plaintiff seeks from *each defendant*. Otherwise, there is no way to determine whether a subsequent judgment against a particular nonsettling defendant is "more favorable" than the offer.' " (*Burch, supra,* 109 Cal.App.4th at p. 547.) This is because, " '[i]n multidefendant cases, the rule barring comparative indemnity claims against a "good faith" settling defendant[8] [citation] and the Prop[osition] 51

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[8] "When concurrent tortfeasors are sued, the various defendants risk liability exposure to the plaintiff and are subject to comparative indemnity claims among themselves. [Citation.] Under section 877.6, a good faith settlement

elimination of joint and several liability for noneconomic damages[9] [citations] play a significant role in the determination of each defendant's ultimate liability. . . . 'Thus, a lump-sum settlement offer made to several defendants whose liability may be apportioned (i.e., *not* jointly liable) must state [the plaintiff's] position as to each defendant's share or percentage of the settlement demand.' " (*Ibid.*)

In contrast, "where multiple defendants face joint and several liability for the entire judgment, the statutory offer to compromise need not be apportioned." (*Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.* (1996) 50 Cal.App.4th 1542, 1544 (*Steinfeld*).) In such cases, an unapportioned offer would "not place [the defendants] in an untenable position, since if they were liable at all, they were jointly and severally liable." (*Id.* at p. 1549.)

"The application of section 998 to undisputed facts is a legal issue we review de novo." (*Gonzalez, supra,* 20 Cal.App.5th at p. 160.)

C. *Analysis*

Plaintiffs do not assert—and we see no basis to find—that Defendant and the Eggers were jointly and severally liable for Plaintiffs' *noneconomic* losses. (See *Diaz, supra,* 51 Cal.4th at p. 1156; cf. *ibid.* ["Because Proposition

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determination bars the nonsettling joint tortfeasors' claims against the settling defendant for partial or comparative indemnity, based on comparative negligence." (*Taing v. Johnson Scaffolding Co.* (1992) 9 Cal.App.4th 579, 584 (*Taing*).)

[9] "Proposition 51 limits the scope of joint liability among tortfeasors. In cases 'based upon principles of comparative fault,' each defendant is liable for all the plaintiff's *economic* damages but only 'for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault.' (Civ. Code, § 1431.2, subd. (a).)" (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1156 (*Diaz*).)

51 applies only to 'independently acting tortfeasors who have some fault to compare,' the allocation of fault it mandates cannot encompass defendants 'who are without fault and only have vicarious liability.' "].) Accordingly, Plaintiffs' unallocated joint offers to Defendant and the Eggers failed to satisfy the requirement that "a lump-sum settlement offer made to several defendants whose liability may be apportioned (i.e., *not* jointly liable) must state [plaintiff's] position as to each defendant's share or percentage of the settlement demand.' " (*Burch, supra,* 109 Cal.App.4th at p. 547.)

Plaintiffs argue the three defendants' joint liability for economic loss was sufficient. Plaintiffs fail to explain why joint liability for some but not all damages is sufficient. Indeed, cases have held that varying liability for noneconomic damages due to Proposition 51 requires a section 998 offer be apportioned. (*Burch, supra,* 109 Cal.App.4th at p. 547 [identifying "the Prop[osition] 51 elimination of joint and several liability for noneconomic damages" as causing defendants to have "*potentially varying liability*" requiring an allocated offer]; *Taing, supra,* 9 Cal.App.4th at p. 586 ["In cases with multiple defendants, Proposition 51 . . . play[s] a significant role in the determination of each defendant's ultimate responsibility. Consequently, . . . if a plaintiff elects to submit a section 998 offer in cases involving multiple defendants, the offer to any defendant against whom the plaintiff seeks to extract penalties for nonacceptance must be sufficiently specific to permit that individual defendant to determine the exact amount plaintiff is seeking from him or her."].) In the cases of joint liability cited by Plaintiffs, the defendants were jointly liable for *all* damages. (See *Steinfeld, supra,* 50 Cal.App.4th at p. 1549 ["In this case, which preceded the adoption of Proposition 51, [the defendants] faced joint and several liability for [the plaintiff's] economic and noneconomic damages."]; *Bihun v. AT&T*

Information Systems, Inc. (1993) 13 Cal.App.4th 976, 1001 [the defendant employer "was jointly liable with its employees on a respondeat superior or vicarious liability theory for the full amount of damages on every cause of action in which [the employer] was named as a defendant"], disapproved on another ground in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664; *Lakin,* at p. 658, fn. 9 [defendant "was either solely liable or jointly and severally liable for the entire judgment"].)

Plaintiffs argue Defendant and the Eggers were "under the same insurance policy and so had a unity of interest needed to evaluate the offer." Plaintiffs cite no authority that coverage under the same insurance policy impacts our analysis under section 998. "Section 998 provides for service of a pretrial settlement offer to a *party* to the action, not to that party's insurer." (*Arno v. Helinet Corp.* (2005) 130 Cal.App.4th 1019, 1025.)

Finally, Plaintiffs argue the jury verdict exceeded the entire offer amount, and therefore even if Defendant paid the entire offer amount he would have achieved a better result than he did by going to trial. A similar argument was rejected in *Taing*: "[The plaintiff] points out that by any calculation he obtained a more favorable judgment against appellant, since appellant could have paid the entire amount of [the plaintiff's] offer and still fared better than the ultimate judgment. However, at the time [the plaintiff] made his section 998 offer to settle, it was his stated position that all three defendants were liable, although he did not advise them of his position as to their individual percentage of liability. Given this position, it is questionable whether [the plaintiff] could reasonably have expected appellant to pay the entire settlement figure and then litigate the liability and damage factors with its codefendants. This defeats one of the benefits of section 998 for the

defendant: avoidance of the time and expense of litigation." (*Taing, supra,* 9 Cal.App.4th at p. 585.)

Accordingly, because the joint section 998 offers were not allocated, Plaintiffs were not entitled to expert costs and prejudgment interest.

DISPOSITION

The award of expert witness costs and prejudgment interest is reversed. The judgment is otherwise affirmed. The parties shall bear their own costs on appeal.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

(A155406)